

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

MEYNARD DESIGNS, INC. AND EARTH
VISIONS INC.,

Plaintiffs and Counterclaim
Defendant,

v.

EARTH PRODUCTS INC.,

Defendant and Counterclaim
Plaintiff.

CIVIL ACTION NO. 05 CV 11781
NMG

EARTH PRODUCTS INC.,

Third-Party Plaintiff and
Counterclaim Defendant,

v.

PLANET, INC.,

Third-Party Defendant and
Counterclaim Plaintiff.

EARTH PRODUCTS INC.,

Plaintiff and Counterclaim
Defendant,

v.

MEYNARD DESIGNS, INC. AND EARTH
VISIONS INC.,

Defendant and Counterclaim
Plaintiffs.

CIVIL ACTION NO. 06 CV 11496
MLW

JOINT MOTION TO CONSOLIDATE

The parties in the above-captioned actions, pursuant to Rule 42(a) of the Federal Rules of Civil Procedure and D. Mass. Local Rule 40.1(J),¹ respectfully move the Court for an Order

¹ D. Mass. Local Rule 40.1(J) requires that "A motion for consolidation of two or more cases shall be made in the case first filed in this court." As the current case, Civil Action No. 05-cv-11781 NMG, was filed in the District of Massachusetts on August 29, 2005, while Civil Action No. 06-cv-11496 MLW was only transferred by order dated July 31, 2006, a motion to consolidate must be filed before this Court.

consolidating Earth Products Inc. v. Meynard Designs, Inc. and Earth Visions, Inc., Civil Action No. 06-cv-11496 MLW, with the present case for all purposes. As all parties hereto stipulate and agree, consolidation would be in the interests of efficiency and judicial economy.

If a common question of law or fact is present in multiple cases, the “court has broad discretion in weighing costs and benefits of consolidation” under Rule 42(a). Tingley Sys., Inc. v. CSC Consulting, Inc., 152 F. Supp. 2d 95, 102 (D. Mass. 2001) (quoting Seguro de Servicio de Salud de Puerto Rico v. McAuto Sys. Group, Inc., 878 F.2d 5, 8 (1st Cir. 1989) (allowing consolidation where party was a defendant in one action and plaintiff in second action). In this circumstance, Earth Products Inc. (“Earth Products”) filed a suit against Meynard Designs, Inc. (“Meynard Designs”) and Earth, Inc. (formerly Earth Visions, Inc.) in the Western District of Washington over the EARTH trademark. On July 31, 2006, the judge in that case ordered the case transferred to the District of Massachusetts, due to lack of personal jurisdiction over Meynard Designs and Earth, Inc., and improper venue. This transferred case has been docketed as Civil Action No. 06-cv-11496 MLW. Meanwhile, on August 29, 2005, Meynard Designs and Earth, Inc. filed the present case before this Court, Civil Action No. 05-cv-11781, over the EARTH trademark.

When considering the claims and counterclaims, the causes of action in these two suits are nearly mirror images of each other. Meynard Designs and Earth, Inc. allege in both cases that Earth Products has violated their rights in the EARTH trademark and that Earth Products has committed trademark infringement, false designation of origin, unfair competition, and violations of state law, as well as asking for declaratory judgments that Meynard Designs and Earth, Inc. had not infringed Earth Products’ trademarks, committed false designations of origin, or violated state law. Earth Products likewise alleges in both cases that Meynard Designs and

Earth, Inc., have violated Earth Products' rights in the EARTH trademark, and have committed trademark infringement, false designation of origin, and have violated state law.

These two cases are related under Local Rule 40.1(G)(1), which states that "a civil case is related to one previously filed in this court if some or all of the parties are the same and if one or more of the following similarities exist also: the cases involve the same or similar claims or defenses; or the cases involve the same property, transaction or event; or the cases involve insurance coverage for the same property, transaction or event; or the cases involve substantially the same questions of fact and law." These cases feature almost exactly the same parties, they involve the same or similar claims or defenses (trademark infringement, false designation of origin, and state unfair competition laws relating to use of the EARTH mark by the parties), they involve the same property, transaction or event (use of the EARTH mark by the parties), and the cases involve substantially the same questions of fact and law (uses by the parties of the EARTH mark and their rights to do so). As a result, when it was transferred, Civil Action No. 06-cv-11496 MLW should have originally been assigned to this Court, but was not.

As these two cases are related and involve almost identical parties and cross-allegations by each side of trademark infringement, false designations of origin, and violations of state laws based on use by the parties of the same EARTH trademark, the two cases clearly deal with common questions of fact and law. Accordingly, consolidation of these cases will enhance judicial economy. No party will be prejudiced by the requested consolidation.

For these reasons, the parties respectfully request that the cases be consolidated.

Respectfully submitted on September 14, 2006,

/s/ Laura Topper

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Certificate of Service

I certify that this document is being filed through the Court's electronic filing system, which serves counsel for other parties who are registered participants as identified on the Notice of Electronic Filing (NEF). Any counsel for other parties who are not registered participants are being served by first class mail on the date of electronic filing.

/s/Laura Topper

Laura Topper